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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

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Diane Cleary v. GCFS, Inc.	Plaintiff, Defendant.	Case No: 08-CV-2241 DMS POR Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant To Fed. R. Civ. P. 12(b)(3) Date: April 3, 2009 Time: 1:30 PM Location: Courtroom 10, Federal Courthouse, San Diego, CA 92101 Judge: Honorable Dana M. Sabraw

1 **I. INTRODUCTION**

2 The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq.
 3 ("FDCPA") and the Rosenthal Fair Debt Collection Practices Act, California Civil
 4 Code §§ 1788-1788.32 ("Rosenthal Act") are designed to protect consumers from
 5 illegal debt collection practices. Congress and the California legislature have
 6 recognized that abusive, deceptive, and unfair debt collection practices "contribute
 7 to the number of personal bankruptcies, to marital instability, to the loss of jobs, and
 8 to invasions of individual privacy."¹ The Federal Trade Commission ("FTC")
 9 recently noted that such practices "cause substantial consumer injury, including
 10 payment of amounts not owed, unintended waivers of rights, invasions of privacy,
 11 and emotional distress."² Illegal collection practices can also place consumers
 12 deeper in debt.³

13 On December 3, 2008, Plaintiff filed an action against the defendant for
 14 numerous violations of the FDCPA and the Rosenthal Act in which she alleges that
 15 "at all times relevant to this matter" she resided in the County of San Diego and that
 16 during that time, the defendant mailed letters to her at her home in San Diego,⁴ and
 17 to her place of employment, also in San Diego.⁵ The defendant spoke with the
 18 Plaintiff at her home in San Diego. These communications, and the conduct
 19 surrounding them, all of which took place in the County of San Diego, are the
 20 subject of this lawsuit. The defendant made threats to the plaintiff, including
 21 comments about how the plaintiff would one day "die" and how the plaintiff's

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 23 ¹ 15 U.S.C. § 1692(a), and through incorporation under the Rosenthal Act pursuant to Cal. Civ.
 24 Code § 1788.17.

25 ² FTC Annual Report 2008: Fair Debt Collection Practices Act, Introduction, page 1. Available at
 26 <http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf>

27 ³ Id.

28 ⁴ Plaintiff's Complaint, ¶¶ 24, 27, 29, and 33.

⁵ Plaintiff's Complaint, ¶ 17.

1 claim that she wanted to care for her children was just an “excuse” to avoid paying
 2 her debts. The defendant also falsely stated to the plaintiff, an unsophisticated
 3 consumer ignorant as to intricacies of litigation, that she had now been “served.”
 4 All of this happened in San Diego, and all of this was illegal. Subsequently, the
 5 defendant actually sued the plaintiff in San Diego County Superior Court.⁶ All of
 6 this activity took place in San Diego, and, consequently, Plaintiff alleged in her
 7 Complaint that venue was proper in the Southern District of California. However,
 8 the defendant now claims the plaintiff filed her Complaint in an improper venue.

9 **II. ARGUMENT**

10 **1. Defendant supports its argument through a truncation of 28 U.S.C. §**
 11 **1391(b).**

12 In its Motion, Defendant argues that the proper venue for this action is the
 13 United States District Court for the Central District of California.⁷ To support this
 14 position the defendant crops the language of 28 U.S.C. § 1391(b) in a way that
 15 gives the impression it says something it does not say. In its Motion, on page 2,
 16 lines 16-19, the defendant states that “28 U.S.C. § 1391(b) clearly states.”

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 18 “A civil action wherein jurisdiction is not founded solely on
 19 diversity of citizenship may, except as otherwise provided by
 20 law, be brought only in (1) a judicial district **where** any
defendant resides, if all defendants reside in the same State...”
 21 28 U.S.C. § 1391(b) [emphasis provided]

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 27 ⁶ See Declaration of Robert L. Hyde, attached.

28 ⁷ Defendant's Motion, page 2, lines 14 - 25.

1 The bold face in this quote is the defendant's, and the defendant adds an
 2 ellipsis to the paragraph, giving the impression that this is the only option available
 3 to the plaintiff. The Defendant ends its Motion with:

4 Therefore, the appropriate venue for this case would have been
 5 'a judicial district where any defendant resides.' (28 U.S.C. §
 6 1391(b)). Since there is no defendant residing in this judicial
 7 district, this case should be dismissed, as venue is improper.

8 However, what 28 U.S.C. § 1391(b) *actually* states is:

9 A civil action wherein jurisdiction is not founded solely on
 10 diversity of citizenship may, except as otherwise provided by
 11 law, be brought only in (1) a judicial district where any
 12 defendant resides, if all defendants reside in the same State, (2)
13 a judicial district in which a substantial part of the events or
14 omissions giving rise to the claim occurred, or a substantial part
15 of property that is the subject of the action is situated, or (3) a
16 judicial district in which any defendant may be found, if there is
17 no district in which the action may otherwise be brought.
 18 (Underscore Added)

19 Notwithstanding Defendant's convenient manipulation of the Rule, Plaintiff
 20 has multiple options under 28 U.S.C. § 1391, including in "a judicial district in
 21 which a substantial part of the events or omissions giving rise to the claim
 22 occurred." Here, *everything* took place in San Diego County. All letters were
 23 mailed to and received by the plaintiff in San Diego.⁸ Plaintiff's employer, where
 24 the defendant contacted the plaintiff, is in San Diego. The defendant eventually
 25 even sued the plaintiff claiming a breach of contract, in San Diego County.⁹

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 27 ⁸ See Declaration of Plaintiff Diane Cleary, attached, ¶¶ 3-7.

28 ⁹ See Declaration of Robert L. Hyde, attached.

1 In deciding Fed. R. Civ. P. 12(b)(3) motions, federal courts generally give
 2 considerable deference to plaintiff's choice of forum. *Terra Int'l Inc. v. Mississippi*
 3 *Chemical Corp.*, 119 F.3d 688, 695 (8th Cir. 1997) ("in general, federal courts give
 4 considerable deference to a plaintiff's choice of forum").

5 **2. The proper venue for this action is the Southern District.**

6 In *Paradise v. Robinson & Hoover*, 883 F. Supp. 521, 524 (D. Nev. 1995), the
 7 court held that in actions involving the FDCPA, the federal district where the
 8 consumer received the collection letter which formed the basis of the action against
 9 the debt collector which sent debt collector is the proper venue because, under 28
 10 USCS § 1391(b)(2), venue is proper if substantial part of events giving rise to claim
 11 occurred in judicial district. As the court noted:

12 Moreover, the Court need not spend much time addressing the
 13 [Defendant's] venue arguments as they are based upon the same
 14 misreading of Plaintiff's Complaint as previously mentioned.
 15 Suffice it to say that venue is proper if a "substantial part of the
 16 events ... giving rise to the claim" occurred in the judicial
 17 district. See 28 U.S.C. § 1391(b)(2). Because "receipt of a
 18 collection notice is a substantial part of the events giving rise to
 19 a claim under the Fair Debt Collection practices Act," *Bates v.*
 20 *C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir. 1992), the
 21 district where a communication is received is a proper venue
 22 under subdivision (2) of section 1391(b). *Id.* at 866-867. See
 23 also [*Russey v. Rankin*, 837 F. Supp. 1103, 1105 (D.N.M.
 24 1993)], (venue proper in New Mexico where defendant's letter
 25 which formed the basis of the plaintiff's claim was purposefully
 26 sent to and received in New Mexico); *Murphy v. Allen County*
 27 *Claims and Adjustments, Inc.*, 550 F. Supp. 128 (S.D. Ohio
 28 1982) (venue proper in both Northern and Southern Districts of
 Ohio where letters on which claim was based were sent from
 Northern District and received in Southern District).

29 Further, it is axiomatic that when persons are being harassed by debt
 30 collectors, those persons are often financially distressed. To impose on Plaintiff the
 31 costs related to bringing this action in another venue would be to impose an undue
 32 burden on Plaintiff.

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1 hardship that could well deny Plaintiff her day in court. In *Gonsalves v. Nat'l*
 2 *Credit Sys., Inc.*, 1990 U.S. Dist. LEXIS 20944, the United States District Court for
 3 the District of Connecticut found that an appropriate venue under 28 U.S.C. §
 4 1391(b) for an FDCPA claim is the district where the injury occurred, or where the
 5 communication was received, and that transfer to the venue of the debt collector
 6 would be inconvenient to the consumer and was denied.

7 Plaintiff's counsel has researched the case law regarding 28 U.S.C. § 1391,
 8 and can find no case in which any court found that the proper venue in an FDCPA
 9 case to be anywhere but where the consumer resided when the illegal
 10 communications took place,¹⁰ and notes that Defendant supplies no such citation.
 11 The proper venue here falls within 28 U.S.C. § 1391(b), and Plaintiff has chosen
 12 the Southern District, as is her right.

13 **3. Defendant does not explain why there is any inconvenience here.**

14 28 USC § 1404(a) was not intended to defeat a plaintiff's right of bringing
 15 his action in such forum as he deemed proper, and wherever possible, consideration
 16 ought to be given to choice of his forum. *Walter v Walter* 235 F Supp 146 (WD PA,
 17 1964). Any showing by Defendant as to inconvenience must be a strong one. *West*
 18 *Publ. Corp. v Stanley* 20 BNA IER Cas 1463 (DC MN 2004) (Federal court in
 19 Minnesota was proper venue for dispute involving non-resident, former employee
 20 of Minnesota-based publishing company who violated non-competition agreement;
 21 court would not transfer venue to California, even though employee and his
 22 witnesses were located there, where employee failed to demonstrate that balance of
 23 factors "strongly" favored transfer.)

24 Modern means of transportation and availability of motion for transfer under
 25 28 USCS § 1404 in case of extreme inconvenience have obviated need for strict
 26 venue rule based on theory of geographic hardship to defendant. *Arnold v. Smith*
 27 *Motor Co.*, 389 F. Supp. 1020 (ND Iowa, 1974). As the Court no doubt knows,

28 ¹⁰ See Declaration of Robert L. Hyde, attached, ¶ 4.

1 Orange County is right next door. The distance between the court Defendant
2 prefers, the Federal Courthouse in Santa Ana, and the Federal Courthouse in San
3 Diego, is less than 90 miles. This is not enough to demonstrate any inconvenience
4 as Defendant never explains why such a distance might be inconvenient. *Wayne*
5 *Pigment Corp. v Halox & Hammond Group, Inc.* 220 F Supp 2d 931 (ED WI 2002)
6 (Defendants' motion to transfer venue under FRCP 12(c) was denied where
7 defendants did not show that transfer to their proposed forum 115 miles away
8 would be more convenient for both parties and their witnesses.) Further, under Fed.
9 R. Civ. P. 45(b)(2)(B), Plaintiff can subpoena these witnesses into San Diego, if he
10 likes. These witnesses would still be exposed to the same "inconvenience," and the
11 fee charged by Amtrak to travel from Santa Ana to San Diego is twenty-one
12 dollars.¹¹ Defendant greatly exaggerates any "inconvenience" that might exist.
13 Further, such an inconvenience would exist as well for Plaintiff and his witnesses if
14 Defendant's request was granted.

15 Here, Defendant merely *says* this forum is inconvenient. Why that would be
16 goes unexplained. Further, in the past, Defendant sued Plaintiff *in San Diego* and
17 never claimed inconvenience at that time.

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28 ¹¹ See Declaration of Robert L. Hyde, attached, ¶ 5.

III. CONCLUSION

This Motion by the defendant should be denied. It should never have been filed. Motions of this type waste the Court's time as well as that of Plaintiff's counsel, and the plaintiff reminds the defendant of a wise comment made by the Fifth Circuit in another consumer rights action:

“The [consumer’s] counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.” *McGowan v. King, Inc.* 661 F.2d 48, 51 (5th Cir. 1981)

Respectfully submitted,

Date: March 13, 2009

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By: /s/Robert L. Hyde
Robert L. Hyde
Attorneys for the Plaintiff